

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

Supreme Court, U. S.

**FILED**

**APR 23 1979**

MICHAEL RODAK, JR., CLERK

**No. 78-1450**

GEORGE DALEY,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

**On Petition for Writ of Certiorari to the Superior Court  
of New Jersey, Appellate Division**

**BRIEF IN OPPOSITION**

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**BRIEF IN OPPOSITION****Opinions Below**

The New Jersey Supreme Court's order denying petitioner's petition for certification appears in petitioner's appendix, at 24a. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's appendix, at 1a to 23a. As to the issue raised in the instant petition, the Appellate Division summarily affirmed, pursuant to New Jersey R. 2:11-3(e)(2).

### Statutes and Rules Involved

N.J.S.A. 2A:111-1. Obtaining money, property, etc., by false pretense.

Any person who, knowingly or designedly, with intent to cheat or defraud any other person, obtains any money, property, security, gain, benefit, advantage or other thing of value by means of false promises, statements, representations, tokens, writings or pretenses, is guilty of a misdemeanor.

N.J.S.A. 2A:102-2. Embezzlement by trustee, etc.

Any person who, being an executor, administrator, assignee, guardian or trustee, or any officer appointed by any court of this state, who embezzles or, with intent to defraud, converts, appropriates, takes, makes away with, secretes or withholds any money or property which comes into his possession, care or control by virtue of his trust, appointment, employment or office, is guilty of a misdemeanor.

N.J.S.A. 2A:85-14. Aiders and abettors; principals

- Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.

New Jersey Rule 2:11-3(e)(2) Criminal Appeals.

When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

### Statement of the Case

Monmouth County Indictment No. 458-74, filed on January 6, 1975, charged petitioner herein, George Daley, and five others with: two counts of obtaining money under false pretenses, N.J.S.A. 2A:111-1; and two counts of embezzlement by a trustee, N.J.S.A. 2A:85-14 and N.J.S.A. 2A:102-2. Defendants' filed a motion to compel a psychiatric examination of a State's witness. By order filed on May 12, 1975, the Honorable Patrick J. McGann, J.S.C. denied the request. Petitioner was tried before the Honorable Andrew A. Salvest, J.S.C., and a jury on June 16, 17, 18, 19, 20, 23, 24, 26, 30, July 1, 2, and 3, 1975, at the conclusion of which defendant was found guilty of both counts of obtaining money by false pretenses, and found not guilty of the remaining charges.

According to the State's proofs, Mortiz Nappe, the State's principal witness, was introduced to defendant in early June 1973 by Raymond Chera, a real estate businessman (3R11-6 to 12-10).<sup>\*</sup> Petitioner told Nappe that he was a builder and that he needed money (3R14-4 to 8). The next day petitioner met Nappe and showed him approximately twenty construction projects in Monmouth and Ocean counties (3R16-4 to 24-8). Petitioner indicated that he needed \$200,000 for a high rise condominium apartment project, known as Avenel Boulevard, Inc. (3R 25-18 to 27-24). Petitioner told Nappe that if he invested \$200,000 in the Avenel project, he could have an option to participate as a partner in three other projects (3R29-10 to 30-14).

On June 5, 1973, petitioner and Michael Sandomeno visited Nappe at his home to further interest him in in-

<sup>\*</sup> 3R refers to the record below, transcript of June 18, 1975.

vesting in the Avenel project (3R39-9 to 40-10). Several days later, Nappe met with petitioner and Richard Bonello in the latter's law office and expressed his desire to advance \$200,000 for the Avenel highrise project (3R46-5 to 47-13). At this meeting, Bovello asserted that the investment of \$200,000 would result in a substantial profit for Nappe (3R51-1 to 25). Petitioner urged that the quicker an agreement could be reached, the more advantageous it would be (3R55-24 to 56-4).

Further meetings resulted in final loan arrangements being made for Nappe at the Jersey Shore Bank. Additionally, on several occasions during these meetings with petitioner, Sandomeno and Bonello, Nappe was told that Avenel project would be completed within a year. Petitioner specifically represented to Nappe that "the first thing, if the investment is made, that they need to finish up the model," referring to Nappe's investment in the Avenel project (3R91-7 to 93-20).

On June 22, 1973, Nappe spoke with petitioner on the telephone, and they informed him that they needed \$75,000 immediately for the Avenel project (3R129-13 to 132-8). Nappe met petitioner and Sandomeno at the Jersey Shore Bank, endorsed in blank a check for \$75,000, and stated that he was advancing the money for the Avenel project (3R134-1 to 139-19). A check for the balance of \$125,000 was endorsed by Nappe and made payable to Avenel Boulevard, Inc. (3R155-15 to 156-12).

The \$75,000 check was deposited that day to the account of Driftwood, Inc. in which defendant served as a director (7R410-6 to 10; T61-2 to 64-1).<sup>\*</sup> On the previous day, June 21, there had been no funds in the Driftwood

<sup>\*</sup> 7R refers to the record below, transcript of June 26, 1975.

8R refers to the record below, transcript of June 30 to July 3, 1975.

account. Immediately upon the deposit, checks were drawn against the \$75,000, reducing the balance to \$15,033.02 (7R468-24 to 469-25). Some of these checks were endorsed by defendant. A substantial portion of the \$75,000 turned over by Nappe to defendant was not used on behalf of the project; indeed, none of it was used to pay for either the model's furniture or the model workmen's payroll as represented by defendant and Sandomeno (7R410-22 to 415-25). The \$125,000 check which was made payable to Avenel Boulevard, Inc. was signed on behalf of Avenel by defendant and Sandomeno and, in turn, made payable to the order of "Anshelewitz, Barr, Ansell & Bonello" (7R498-19 to 499-5). The check was deposited in the Bonello law firm's trust account (7R499-6 to 500-13). Thereafter, checks payable to corporations and individuals other than Avenel were drawn against these funds.

At the conclusion of the trial, the jury found defendant and Sandomeno guilty of two counts of obtaining money by false pretenses.

On August 1, 1975, petitioner was sentenced to the Monmouth County Correctional Institution for two concurrent six month terms. The sentence was suspended and a one year probationary term was imposed. Petitioner was also fined \$1,000 on each charge. Motions for judgments of acquittal, or alternatively, a new trial, were denied by Judge Salvest prior to imposing sentence. The Appellate Division affirmed petitioner's convictions on June 13, 1978, and the New Jersey Supreme Court denied his petition for certification on December 19, 1978.



## REASONS FOR DENYING CERTIORARI

### POINT I

#### **Prosecutorial conduct in no way violated petitioner's Sixth Amendment rights.**

Initially, it should be noted that petitioner herein has failed to identify the errors of which he now complains. Rather he alludes to vague instances of improper questions and comments made by the prosecutor in the proceedings below. The State submits that the lack of specificity in petitioner's claim could lead this Court into making a decision in a vacuum. Moreover, the State submits that petitioner fails to demonstrate that the alluded to errors are of constitutional dimensions.

The State acknowledges that a prosecuting attorney's primary duty is not to obtain convictions, but to insure that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935); *State v. Johnson*, 65 N.J. 388, 392 (1975); *State v. Farrell*, 61 N.J. 99, 104-105 (1972). In performing his duties, the prosecutor is permitted to make a vigorous presentation, however, he must stay within the bounds of due process and fair play. *State v. DiPaglia*, 64 N.J. 288, 197 (1974); *State v. Farrell*, *supra*, at 104; *State v. Kenny*, 128 N.J. Super. 94, 111 (App. Div. 1974), *aff'd* 68 N.J. 17 (1975).

The State submits that in the instant case, the prosecutor's conduct during trial, although vigorous and forceful, did not result in a denial of petitioner's rights to a fair and impartial trial. The record does indicate that certain evidential complexities incurred some disagreement between the prosecutor and the court during the very lengthy trial; still, at no time did the trial court allow the pro-

ceedings to go beyond the bounds of propriety. Moreover, the jury which convicted petitioner was an astute one. They scrutinized the abundant evidence and returned a rational verdict based on that evidence. Additionally, the trial court instructed the jury on several occasions that the comments of counsel were not evidence and were not to be considered by them; indeed the instructions focused the jury's attention upon the facts and insured petitioner's right to a fair trial (6R196-19 to 197-9; 7R61-4 to 11; 8R95-1 to 5; 9R65-18 to 24).<sup>\*</sup> There can be no assumption that the jury did not faithfully follow the judge's instructions. *State v. Manley*, 54 N.J. 259, 271 (1969).

In sum, the State submits that a thorough review of the record below compels the conclusion that petitioner was accorded a fair and impartial trial, and was convicted on ample credible evidence. *State v. Harper*, 128 N.J. Super. 270, 276 (App. Div. 1974), *certif. den.* 65 N.J. 574 (1974). Thus, on the facts of the case at bar, no constitutional issues are presented.

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<sup>\*</sup> 6R refers to the record below, transcript of June 23-24, 1975.

9R refers to the record below, transcript of July 3, 1975.

## CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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